

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

JUN 01 2001

R. J. Munn
CLERK

RAMAH NAVAJO CHAPTER,
and OGLALA SIOUX TRIBE, for
themselves and on behalf of a
Class of persons similarly situated,

Plaintiffs,

VS.

No. CIV 90-0957 LHMWD

BRUCE BABBITT, Secretary of the Interior; KEVIN GOVER, Assistant Secretary of the Interior; ROBERT J. WILLIAMS, Acting Inspector General, U.S. Department of the Interior; and THE UNITED STATES OF AMERICA.

Defendants.

**STIPULATED ORDER REGARDING EQUITABLE RELIEF
TO IMPLEMENT BENCHMARKING METHODOLOGY**

The Plaintiffs by and through their Class counsel Michael P. Gross and Co-Class counsel C. Bryant Rogers and the Defendants by and through their counsel John W. Zavitz, in recognition of the 10th Circuit Court of Appeal's decision in the above-styled and numbered matter and in a further attempt to amicably resolve the equitable claims in this case, hereby agree to enter the following order:

BE IT ORDERED, ADJUDGED AND DECREED

1. For indirect cost rates negotiated for fiscal year 2001 and fiscal year 2002 and otherwise in accordance with ¶8 below, the Defendants shall calculate for each Class member (hereinafter "contractor", which term includes compactor) which submits

an indirect cost rate proposal to the Office of Inspector General, U.S. Department of the Interior for such year an adjusted indirect cost rate ("IDC rate") based on the benchmarking methodology approved by this Order.

2. Such negotiated rates shall be based upon the cost principles contained in the Office of Management and Budget Circular A-87 and on ASMBC-10, adopted April 8, 1997, the "Implementation Guide for Office of Management and Budget Circular A-87," and with 25 U.S.C. § 450 *et seq.*, as modified by the benchmarking adjustment required by this Order. This rate (and the benchmarking adjustment) shall be memorialized in writing, as before, pursuant to OMB Circular A-87.

3. The Office of Inspector General may correct any internal inconsistencies as regards OIG interpretations of OMB Circular A-87 or ASMBC-10 as described at pp. 48-49 as identified in the GAO Report of June 1999 in calculating the indirect cost rate under this paragraph, PROVIDED THAT nothing in this order shall be construed as this Court's approval of the substance of such correction. The Class and Class members reserve the right to challenge the legality or propriety of any such corrections.

4. This Order requires defendant OIG to calculate a benchmarking adjustment to the IDC rate, and for BIA to apply that adjusted rate to BIA programs in the IDC base, pursuant to the formula set forth on Exhibit "A" to this Order. That Exhibit is hereby incorporated herein and made a part of this Order to the same extent as if expressly set forth herein. The adjusted IDC rate shall be calculated in accordance with Exhibit "A" for all types of OIG approved IDC rates, whether fixed, fixed with carry forward, or provisional-final. Exhibit "A" specifies when and how this adjusted rate shall be used for each type of IDC rate.

5. This Order shall govern indirect cost rate determinations and agreements for FY 2001 and FY 2002 for contractors with the BIA under The Indian Self-Determination And Education Assistance Act, as amended, 25 U.S.C. §§ 450 *et seq.* Defendants' adherence to this Order shall place them in compliance with the law of the case and Congress' modification thereof through legislation, Pub. L. 106-113, §113.

6. Nothing in this Order or Plaintiffs' consent thereto shall be construed to waive or release Plaintiffs' claims for money damages for failure of Defendants to pay contractors' indirect costs or contract support in the amounts established by adjusted indirect cost rates calculated as set forth in this Order or as otherwise provided by law and reserved in the Parties' Partial Settlement Agreement approved by Order of the Court dated May 14, 1999. Nothing in this Order shall be construed as modifying or relinquishing either Party's claims or defenses regarding the extent of Defendants' contractual and legal obligation to compensate contractors at the levels determined by their indirect cost rates, including the rate adjustment required by this Order.

7. Implementation of the Benchmarking methodology shall be carried out during the ordinary rate adjustment negotiations which for FY 2001 and FY 2002 will occur after FY 2001 and FY 2002. However, nothing in this Order shall be construed to require Defendants to agree to otherwise extend this Order beyond FY 2002. In the event this Order is not extended or replaced with Plaintiffs' consent, Plaintiffs reserve their right to seek further declaratory and injunctive relief regarding Defendants' system for calculating indirect cost rates.

8. In no event shall Class members or other federal agencies be obligated to apply the benchmarking adjustment to their own tribal funds or other federal, state or private funds included in their direct cost bases.

9. Plaintiffs shall, through Class counsel, secure an independent consultant to study the benchmarking methodology approved by this Order to objectively determine whether the benchmarking methodology approved by this Order reasonably reflects the cost of operating the Pub. L. 93-638 programs contracted with the BIA under ISDA. This analysis shall reasonably consider economies of scale and the extent of inelasticity of indirect cost pools in relation to BIA and other federal agency funds in the direct cost base. The Court hereby approves use of monies from the reserve account now held in CRIS sub-account No. 1:90-CB0957-02 to pay for Plaintiffs' costs in obtaining this reform and to pay for this study upon submission of a proposed contract for undertaking the study (including agreed protocols and specifications) reviewed by all parties, such costs to be specifically approved by further order of the Court upon application by Plaintiffs.

10. This Order rescinds and replaces the Court's prior "Stipulated Order Regarding Equitable Relief" entered on September 21, 1999 (Docket No. CIV 90-0957 LH/WWD) and all prior Orders of the Court regarding equitable relief.

C. LeROY HANSEN

UNITED STATES DISTRICT JUDGE

Submitted by:

M.P. GROSS & ASSOCIATES, P.C.

By Michael P. Gross
Michael P. Gross
Class Counsel

ROTH, VanAMBERG, ROGERS, ORTIZ,
FAIRBANKS & YEPA, LLP

By C. Bryant Rogers
C. Bryant Rogers
Co-Class Counsel

OFFICE OF THE UNITED STATES ATTORNEY

By Telephonically Approved 05/24/01
John W. Zavitz
Assistant United States Attorney
Counsel for Defendants

05/14/01

EXHIBIT "A" TO STIPULATED ORDER REGARDING EQUITABLE
RELIEF TO IMPLEMENT BENCHMARKING METHODOLOGY

This Exhibit sets out the "benchmarking methodology" approved by the Court in the "Stipulated Order Regarding Equitable Relief to Implement Benchmarking Methodology," to which this Exhibit is attached. That methodology requires defendant OIG to calculate a benchmarking adjustment to the Class members' Indirect cost ("IDC") rates as established under OMB Cir. A-87, and for BIA and OIG to implement and apply that adjusted rate as to BIA programs in the IDC base in calculating BIA indirect cost obligations for the periods covered by said Order, as set forth in said Order and pursuant to the methodology set out on the Excel flow chart appended hereto as Exhibit B. An electronic form of that same flow chart is also appended as Exhibit C.

All numbers on the flow chart are hypothetical. The methodology is set out in the column headings and in fn.1 to the flow chart.

STEP 1: (Columns A-L)

Columns B-F of the flow chart simply identify the data and factors needed to carry out the calculations called for on the flow chart, as follows:

Column B= The Contractor's negotiated indirect cost pool amount

Column C= The total amount of BIA funds in Contractor's IDC base

Column D= The total of non-federal funds in the Contractor's IDC base, including tribal,
state and private monies

Column **E**= The total of other federal funds in the Contractor's IDC base. This does not include IHS funds.

Column **F**= The total of the IHS funds in the Contractor's base

Column **G**= The negotiated IDC rate for a given period as determined by OIG per OMB Circular A-87. Rate is rounded up to 2 decimal places.

Column **H**= The OIG IDC rate that excludes all federal funds, except BIA and IHS funds, from the IDC base to reflect the 10th Circuit's decision in *Ramah*. Rate is rounded up to 2 decimal places.

Column **I**= The difference between the adjusted IDC Rate under the *Ramah* ruling (Col. **H**) and the regular IDC Rate determined per OMB Circular A-87 (Col. **G**). Rate is rounded up to 2 decimal places.

Column **J**= The maximum theoretical IDC dilution caused by the inclusion of other federal agencies in the IDC Base assuming no IDC funds were collected from them.

Column **J1**= Column **J1** is the amount of indirect costs from other federal agencies under OMB A-87 IDC rate agreement. This number is calculated by multiplying each of the other federal agencies funds included in the IDC base (Col. **E**) times the contractor's approved IDC rate (Col. **G**)

Column **K**= The actual amount of IDC collections from other federal agencies other than BIA and IHS. If the data shows that the contractor actually recovered more from other federal agencies than was needed to cover their share of IDC under the A-87 methodology, the amount actually recovered will be entered in Col. **K**. (Any negative carry forward adjustment which would result from such an actual over-recovery under the A-87 methodology will be handled through the normal A-87 process for addressing such over-recovery, but will not result in a negative benchmarking adjustment).

Column **K1**= Amount of other agencies shortfall in paying IDC amount shown in Col. **J1**.

This shortfall is calculated by deducting the actual IDC amount collected from the other federal agencies from the amount of IDC due from those other federal agencies (Col. **J1** minus Col. **K**).

Column **L**= The net additional indirect costs that are attributable to BIA programs to offset the effect of the IDC rate dilution caused by the application of the OMB Circular A-87 methodology under the *Ramah* decision, without taking account section 113 of Pub. L. 106-113, Department of the Interior Appropriations Act for fiscal year 2000. When the amount entered in Col. **K1** reflects an actual over-recovery from another federal agency, a \$-0- will be entered in Col. **L**. If the IDC shortfall attributable to other federal agencies shown in Col. **K1** is

greater than the maximum theoretical IDC dilution caused by inclusion of other federal funds in the contractors IDC base (as shown in Col. J.) the amount shown in Col. J will be entered under Col. L.

STEP 2: Calculate the benchmarking percentage:

(1) Calculate the benchmarking percentage for use in determining what it costs to operate BIA programs. This adjustment is a necessary step in the benchmarking methodology mandated since the enactment of § 114 of the Interior Appropriations Acts of 1999, subsequently reenacted and made applicable to all future years by § 113 of Pub. L. 106-113. That statutory provision narrowed the law of this case as established by the 10th Circuit. This step is thus required to ensure that the BIA does not pay for any contract support costs associated with any contract, grant, cooperative agreement or compact between a tribe and any other entity other than the Department of the Interior. The benchmarking percentage is determined by identifying within which of 21 benchmarks the following ratio falls:

$$\text{Col. C} / (\text{Col. C} + \text{Col. E} + \text{Col. F}) = \text{Col. M}$$

Where Columns C, E and F have the same definitions as shown in Step 1 and the percentage shown in Column M is defined as the "benchmarking ratio." Column M shows the ratio of BIA funds to total federal funds in a given Class member's IDC base. The ratio shown in Column M is stated in percentage terms, rounded to the nearest whole percentage point.

(2) The 21 benchmarks to be used in this **Step 2** are set out on fn. 1 of the flow chart where Column **M** constitutes the benchmarking ratio and Column **N** shows the "benchmarking percentage" which will be applied in **Step 3** to calculate the "benchmarking adjustment."

If $M = 0$ then $N = 0$

If $1 < M \leq 5$ then $N = 5\%$

If $5 < M \leq 10$ then $N = 10\%$

If $10 < M \leq 15$ then $N = 15\%$

If $15 < M \leq 20$ then $N = 20\%$

If $20 < M \leq 25$ then $N = 25\%$

If $25 < M \leq 30$ then $N = 30\%$

If $30 < M \leq 35$ then $N = 35\%$

If $35 < M \leq 40$ then $N = 40\%$

If $40 < M \leq 45$ then $N = 45\%$

If $45 < M \leq 50$ then $N = 50\%$

If $50 < M \leq 55$ then $N = 55\%$

If $55 < M \leq 60$ then $N = 60\%$

If $60 < M \leq 65$ then $N = 65\%$

If $65 < M \leq 70$ then $N = 70\%$

If $70 < M \leq 75$ then $N = 75\%$

If $75 < M \leq 80$ then $N = 80\%$

If $80 < M \leq 85$ then $N = 85\%$

If $85 < M \leq 90$ then $N = 90\%$

If $90 < M \leq 95$ then $N = 95\%$

If $95 < M \leq 100$ then $N = 100\%$

STEP 3: Calculate the benchmarking adjustment. Multiply the benchmarking percentage determined in **Step 2** and shown in Column **N** times the result of **Step 1** ($\text{Col. L} \times \text{Col. N} = \text{Col. P}$) where

Column **N**= The percentage of inelasticity of indirect costs attributable to operating BIA programs.

Column **O**= The amount of the BIA's IDC per the OMB A-87 methodology.

Column **P**= The additional indirect costs that are attributable to operating BIA programs. This amount shall be reflected in the Class members' IDC rate for application to all BIA funds in the Class members' IDC base based on the rate adjustment process set in Step 4. **P** shall be stated in dollars and rounded to the nearest whole dollar.

Column **Q**= The total amount of indirect costs attributed to operating BIA programs after application of the benchmarking methodology.

STEP 4: Calculate the IDC rate to be used by BIA to implement the benchmarking adjustment for a given contract year. This benchmarked IDC rate is calculated and shown in Column **R**. The incremental increase in that rate as compared to the original IDC rate calculated per OIG per OMB Circular A087 is shown in Column **S** for informational purposes.

FURTHER INSTRUCTIONS REGARDING STEP 4:

1. For fixed IDC rates the adjustments for benchmarking shall be made in the next IDC rate negotiation cycle, but using data from the period to which the prior fixed rate applied. The data to be inserted Columns **B - F** for the calculation shown in Column **G** [$\text{Col. B}/(\text{Col. C} + \text{Col. D} + \text{Col. E} + \text{Col. F})$] shall be based on the IDC pool and agency funding levels used in the original fixed rate calculation. The incremental increase shown in Col. **S** calculated per the above formula, as shown in Exhibit B shall thereafter be added to the new rate otherwise calculated by OIG for all purposes regarding calculation of IDC need for BIA funds administered under BIA-ISDEA contracts per 25 U.S.C. § 450 *et seq.*

2. For fixed with carry forward IDC rates the foregoing shall be performed after the close of the contract year for which the benchmarking methodology is being applied prior to computation of the normal carry forward adjustments per OMB Circular A-87 as modified by 25 U.S.C. § 450 *et seq.* The data to be inserted in Columns **B-G** for the calculation shown in Column **G** [$\text{Col. B}/(\text{Col. C} + \text{Col. D} + \text{Col. E} + \text{Col. F})$] shall be based on the IDC pool and agency funding levels which will be used in computing the normal carry forward adjustments. The adjusted rate calculated under the benchmarking methodology and shown in Column **R** shall be the fixed rate used when the normal carry forward adjustments are calculated. Any IDC carry forward adjustments which may result from the benchmarking methodology shall be applied to BIA program funds only.

3. For provisional-final IDC rates this calculation shall be performed after the close of the contract year for which the benchmarking methodology is being applied as part of the computation of the normal provisional/final rate adjustments per OMB Circular A-87 as modified by 25 U.S.C. § 450 *et seq.* The data to be inserted in Columns **B - F** for the calculation shown in Column **G** [$\text{Col. B} / (\text{Col. C} + \text{Col. D} + \text{Col. E} + \text{Col. F})$] shall be based on the IDC pool and agency funding levels determined in the original provisional rate calculation. Thus, the adjusted rate (Column **R**) calculated per the above procedure shall be the provisional rate used when the normal provisional/final rate adjustments are performed and the final rate calculated.

4. Because carried forward adjustments under benchmarking are to be calculated without penalty to the contractor, the tribe must administer multiple rates: one for BIA programs and one IDC rate for all other programs. However, unlike ordinary situations involving multiple rates, the contractors will not be required to submit multiple IDC proposals and OIG will not be required to analyze multiple IDC proposals and neither party will be required to engage in multiple IDC rate negotiations.

REVISED BENCHMARKING FLOWCHART FOR BIA (May 14, 2001)

A	B	C	D	E	F	G	H	I
	IDC POOL	BIA FUNDS IN IDC BASE	NON FED FUNDS IN IDC BASE (TRIBAL, STATE, PRIVATE)	OTHER FED FUNDS IN IDC BASE	IHS FUNDS IN IDC BASE	IDC RATE PER OMB CIRCULAR A- 87	ADJUSTED IDC RATE REFLECTING EXCL. OF OTHER FED. FUNDS FROM IDC BASE PER 10TH CIRCUIT'S RULING; PURE RAMAH ADJUSTED RATE	DIFFERENCE BETWEEN ADJUSTED IDC RATE UNDER RAMAH RULING AND OIG IDC RATE
						B/(C+D+E+F)	B/(C+D+F)	H-G
EXAMPLE 1	400,000	1,300,000	0	400,000	0	23.53%	30.769231%	7.239819%
EXAMPLE 2	2,000,000	2,900,000	6,000,000	2,300,000	500,000	17.24%	21.505376%	4.263997%
EXAMPLE 3	700,000	900,000	720,000	1,200,000	750,000	19.61%	29.535865%	9.928022%
EXAMPLE 4	210,000	730,000	35,000	193,000	210,000	17.98%	21.538462%	3.559009%
EXAMPLE 5	300,000	500,000	30,000	50,000	200,000	38.46%	41.095890%	2.634352%
EXAMPLE 6	1,700,000	3,100,000	700,000	1,700,000	1,800,000	23.29%	30.357143%	7.069472%
EXAMPLE 7	1,400,000	2,500,000	850,000	1,300,000	150,000	29.17%	40.000000%	10.833333%
EXAMPLE 8	4,200,000	6,000,000	600,000	6,000,000	2,100,000	28.57%	48.275862%	19.704433%
EXAMPLE 9	850,000	2,000,000	700,000	300,000	300,000	25.76%	28.333333%	2.575758%
EXAMPLE 10	500,000	1,500,000	200,000	500,000	250,000	20.41%	25.641026%	5.232862%
EXAMPLE 11	1,250,000	4,200,000	1,020,000	250,000	645,000	20.44%	21.312873%	0.871336%
EXAMPLE 12	300,000	500,000	400,000	350,000	70,000	21.13%	28.037383%	6.910623%
EXAMPLE 13	2,300,000	1,500,000	0	1,100,000	2,500,000	45.10%	57.500000%	12.401961%
NOTE 1:	BENCHMARKING PERCENTAGE CALCULATION (COLUMN M):							
	IF M=0 THEN N=0%							
	IF 1 < M < 5 THEN N = 5%							
	IF 5 < M < 10 THEN N = 10%							
	IF 10 < M < 15 THEN N = 15%							
	IF 15 < M < 20 THEN N = 20%							
	IF 20 < M < 25 THEN N = 25%							
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	IF 55 < M < 60 THEN N = 60%							
	IF 60 < M < 65 THEN N = 65%							
	IF 65 < M < 70 THEN N = 70%							
	IF 70 < M < 75 THEN N = 75%							
	IF 75 < M < 80 THEN N = 80%							
	IF 80 < M < 85 THEN N = 85%							
	IF 85 < M < 90 THEN N = 90%							
	IF 90 < M < 95 THEN N = 95%							
	IF 95 < M < 100 THEN N = 100%							

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RAMAH NAVAJO CHAPTER,
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Class of persons similarly situated,

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BRUCE BABBITT, Secretary of the
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U.S. Department of the Interior;
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Defendants.

No. CIV 90-0957 LHMWD

JOINT MOTION FOR PRELIMINARY
AND FINAL APPROVAL OF STIPULATED ORDER REGARDING EQUITABLE
RELIEF TO IMPLEMENT BENCHMARKING
METHODOLOGY AND ORDER THAT NOTICE BE
SENT TO THE CLASS

The Plaintiffs by and through their counsel Michael P. Gross and C. Bryant Rogers and the Defendants by and through their counsel John W. Zavitz, have reached an agreement on terms and conditions to settle the Class' remaining claims for equitable relief in this class action case and hereby move as follows:

1. The parties seek the Court's preliminary approval of a proposed Stipulated Order Regarding Equitable Relief to Implement Benchmarking Methodology for a two year period commencing October 1, 2000, an Order that notice be sent to the Class, a setting

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for an evidentiary hearing to consider final approval of that proposed Order, and, following that hearing, final approval of that Order.

2. The terms of the proposed benchmarking methodology are set forth in the form of proposed Stipulated Order Regarding Equitable Relief to Implement Benchmarking Methodology, a copy of which is attached hereto as Exhibit 2 to a proposed form of notice to the class respecting that proposed benchmarking Order. The proposed Notice is attached hereto as Exhibit 1.

3. The parties stipulate that the proposed Order adopts a methodology which reasonably implements the law of this case, as modified by subsequent acts of Congress, in particular § 113 of Pub. L. 106-113, the FY 2000 Interior Appropriations Act, which has since been made permanent as more fully set forth in the attached proposed Notice.

4. The proposed Order has been arrived at by extensive arms length bargaining since entry of the Court's Stipulated Order on equitable relief (Docket 330) entered September 21, 1999, which *inter alia* ordered the parties to attempt to negotiate the equitable relief issues remaining in this case.

5. The parties have completed sufficient formal or informal discovery to enable them to reach an informed and intelligent settlement with respect to the Class' remaining claims for equitable relief in this action.

WHEREFORE, the parties respectfully move for

1. Preliminary approval of the Stipulated Order Regarding Equitable Relief to Implement Benchmarking Methodology;

2. A setting for the evidentiary hearing to consider final approval of the Stipulated Order Regarding Equitable Relief to Implement Benchmarking Methodology;

3. An Order that Class Counsel send notice to the Class substantially in the form attached hereto as Exhibit 1, the cost thereof to be reimbursed from the Reserve Account established pursuant to the Partial Settlement Agreement approved May 14, 1999; and
4. Following the evidentiary hearing, granting final approval of the Stipulated Order Regarding Equitable Relief to Implement Benchmarking Methodology.

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